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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**
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7 WELLS FARGO BANK, NATIONAL
8 ASSOCIATION AS TRUSTEE FOR OPTION
9 ONE MORTGAGE LOAN TRUST 2007-5,
ASSET-BACKED CERTIFICATES, SERIES
2007-5,

10 Plaintiff,

11 vs.

12 ENTRUST EDUCATION TRUST/DEUK
13 CHOI TRUSTEE et al.,

14 Defendants.

3:16-cv-00758-RCJ-VPC

ORDER

15 This case arises from a residential foreclosure by the Meadowview Terrace Townhouse
16 Association (“the HOA”) for failure to pay HOA assessments. Now pending before the Court are
17 competing Motions for Summary Judgment. (ECF Nos. 30, 31.)

18 **I. FACTS AND PROCEDURAL BACKGROUND**

19 In February 1998, Deanna Milton purchased the subject property located at 2605 Starks
20 Way in Reno, Nevada (“the Property”). On January 24, 2007, a deed of trust signed by Ms.
21 Milton was recorded against the Property, securing a loan in the amount of \$140,000, and
22 identifying Option One Mortgage Corporation (“Option One”) as beneficiary (“the DOT”).
23 (Deed of Trust, ECF No. 32-2.) On June 18, 2014, as a result of the homeowner’s failure to pay
24 HOA fees, the HOA caused a lien for delinquent assessments to be recorded against the

1 Property. Subsequently, a notice of default and election to sell (“NOD”) was recorded on July
2 25, 2014, followed by a notice of foreclosure sale (“NOS”) on November 8, 2014. The NOS
3 indicated the Property would be sold at public auction on December 17, 2014. (Notice of Sale,
4 ECF No. 32-6.) Accordingly, a sale was conducted on that date, and Defendant Entrust
5 Education Trust/Deuk Choi Trustee (“Entrust”)¹ purchased the Property for \$51,100.
6 (Foreclosure Deed, ECF No. 32-7.) Approximately two years later, in November 2016, Sand
7 Canyon Corporation—successor entity to Option One—assigned the DOT to Plaintiff Wells
8 Fargo. (Assignment, ECF No. 32-3.)

9 On December 28, 2016, Wells Fargo filed this action, asserting claims against Entrust
10 and the HOA for (1) quiet title and declaratory relief, (2) preliminary and permanent injunction,
11 (3) unjust enrichment, (4) statutorily defective foreclosure, (5) negligence, and (6) negligence per
12 se. The Complaint is aimed at establishing the continued validity of Wells Fargo’s DOT
13 following the HOA’s foreclosure sale. On May 26, 2017, Entrust answered the Complaint and
14 asserted a counterclaim for quiet title and declaratory judgment. Entrust also asserted cross-
15 claims against the HOA for (1) unjust enrichment, (2) equitable mortgage, and (3) indemnity. On
16 May 30, 2017, the HOA filed a third-party complaint against The Clarkson Law Group, P.C., its
17 non-judicial foreclosure agent, but then voluntarily dismissed the complaint approximately four
18 months later. (Notice of Voluntary Dismissal, ECF No. 27.)

19 Now, Entrust moves for summary judgment on its quiet title counterclaim against Wells
20 Fargo. (Def.’s Mot. Summ. J., ECF No. 30.) Wells Fargo also moves for summary judgment
21 against Entrust. (Pl.’s Mot. Summ. J., ECF No. 31.) Wells Fargo argues that the Ninth Circuit’s
22 ruling in *Bourne Valley Court Tr. v. Wells Fargo Bank, NA*, 832 F.3d 1154 (9th Cir. 2016), *cert.*
23

24 1 In its summary judgment motion, Entrust noted that it has been incorrectly named in this
action, and that its proper name is Entrust Education Trust, Kwangsun Choe, Trustee.

1 *denied*, 137 S. Ct. 2296, 198 L. Ed. 2d 726 (2017), entitles it to a declaration that the HOA’s
2 foreclosure sale did not extinguish the DOT. If the Court grants this relief, then Wells Fargo
3 asserts “the sole remaining claim in this case by Wells Fargo would [be] the claim for unjust
4 enrichment,” and that it will “voluntarily dismiss that claim without prejudice.” (Pl.’s Mot.
5 Summ. J. 7–8.)

6 **II. LEGAL STANDARDS**

7 A court must grant summary judgment when “the movant shows that there is no genuine
8 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
9 Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *See Anderson*
10 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if
11 there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See*
12 *id.* A principal purpose of summary judgment is “to isolate and dispose of factually unsupported
13 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

14 In determining summary judgment, a court uses a burden-shifting scheme. The moving
15 party must first satisfy its initial burden. “When the party moving for summary judgment would
16 bear the burden of proof at trial, it must come forward with evidence which would entitle it to a
17 directed verdict if the evidence went uncontroverted at trial.” *C.A.R. Transp. Brokerage Co. v.*
18 *Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citation and internal quotation marks
19 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or
20 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate
21 an essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
22 party failed to make a showing sufficient to establish an element essential to that party’s case on
23 which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24.

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1 If the moving party fails to meet its initial burden, summary judgment must be denied and
2 the court need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*,
3 398 U.S. 144 (1970). If the moving party meets its initial burden, the burden then shifts to the
4 opposing party to establish a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v.*
5 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,
6 the opposing party need not establish a material issue of fact conclusively in its favor. It is
7 sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the
8 parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
9 *Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid
10 summary judgment by relying solely on conclusory allegations unsupported by facts. *See Taylor*
11 *v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the
12 assertions and allegations of the pleadings and set forth specific facts by producing competent
13 evidence that shows a genuine issue for trial. *See Fed. R. Civ. P. 56(e); Celotex Corp.*, 477 U.S.
14 at 324.

15 At the summary judgment stage, a court's function is not to weigh the evidence and
16 determine the truth, but to determine whether there is a genuine issue for trial. *See Anderson*, 477
17 U.S. at 249. The evidence of the nonmovant is "to be believed, and all justifiable inferences are
18 to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely
19 colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.
20 Notably, facts are only viewed in the light most favorable to the nonmoving party where there is
21 a genuine dispute about those facts. *Scott v. Harris*, 550 U.S. 372, 380 (2007). That is, even
22 where the underlying claim contains a reasonableness test, where a party's evidence is so clearly
23 contradicted by the record as a whole that no reasonable jury could believe it, "a court should not
24 adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.*

III. ANALYSIS

a. Quiet Title and Declaratory Relief

This Court has ruled that because *Bourne Valley* struck down NRS Chapter 116’s “opt-in” notice scheme as facially unconstitutional, actual or reasonable notice is inapposite. *See, e.g., Bank of N.Y. Mellon v. Ravenstar Invs., LLC*, No. 3:17–cv–116, 2017 WL 2588088, at *3–4 (D. Nev. June 14, 2017) (Jones, J.). The Court will therefore quiet title in favor of Wells Fargo under *Bourne Valley*.

Contrary to the arguments of Entrust, no decision of the Nevada Supreme Court relieves this Court of its obligation to follow *Bourne Valley*. It is true that the Nevada Supreme Court has held that the non-judicial foreclosure scheme of NRS Chapter 116 does not implicate state action under the Due Process Clauses of the United States and Nevada Constitutions. *See Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg., a Div. of Wells Fargo Bank, N.A.*, 388 P.3d 970, 975 (Nev. 2017). However, the Nevada Supreme Court’s opinion is not binding on this Court with respect to the statute’s constitutionality under the U.S. Constitution; on that question, the Court must adhere to Ninth Circuit precedent. *See Watson v. Estelle*, 886 F.2d 1093, 1095 (9th Cir. 1989) (stating that the decision of a state supreme court construing the U.S. Constitution is not binding on federal courts).

Entrust also argues that the foreclosure sale in this case is saved by Nevada’s “return doctrine.” That is, although the 1993 opt-in version of Chapter 116’s notice scheme was ruled unconstitutional in *Bourne Valley*, the previous version required the HOA to give notice without an opt-in requirement. *See Nev. Rev. Stat. § 116.31168* (1991) (“The association must also give reasonable notice of its intent to foreclose to all holders of liens in the unit who are known to it.”). Defendants assert that under the return doctrine, an unconstitutional statute reverts to its latest constitutional version, *see We the People Nev. ex rel. Angle v. Miller*, 192 P.3d 1166, 1176

1 (Nev. 2008), so the Court should assess the constitutionality of the HOA’s sale in this case under
2 the 1991 version of NRS 116.31168. The Court rejects these arguments for reasons given by
3 another judge of this District. *See PNC Bank, N.A. v. Wingfield Springs Cmty. Ass’n*, No. 3:15-
4 cv-349, 2017 WL 4172616, at *3 (D. Nev. Sept. 20, 2017) (Du, J.).

5 Upon even closer examination, the Court is convinced that the 1991 version of NRS
6 116.31168 is also insufficient under the Due Process Clause. First, the previous statute only
7 required notice of the “intent to foreclose,” Nev. Rev. Stat. § 116.31168 (1991), e.g., via a notice
8 of default and election to sell. The Due Process Clause, however, requires “[n]otice by mail or
9 other means as certain to ensure actual notice” of the “proceeding which will adversely affect the
10 liberty or property interests of any party,” e.g., via a notice of sale. *Mennonite Bd. of Missions v.*
11 *Adams*, 462 U.S. 791, 800 (1983) (“[A] mortgagee’s knowledge of delinquency in the payment
12 of taxes is not equivalent to notice that a tax sale is pending.”). Second, the Due Process Clause
13 requires notice not only to those lienholders “who are known,” Nev. Rev. Stat. § 116.31168
14 (1991), but to all lienholders whose “name[s] and address[es] are reasonably ascertainable.”
15 *Mennonite Bd. of Missions*, 462 U.S. at 800. Because the 1991 version of NRS 116.31168
16 permitted foreclosure without reasonable notice of the time and place of sale to all lienholders
17 whose identities and addresses were reasonably ascertainable, but only notice of the bare intent
18 to foreclose to those lienholders who were already known, the return doctrine cannot validate the
19 foreclosure here even assuming the doctrine applies precisely as Entrust argues it does.

20 **b. Commercial Unreasonableness**

21 As the Court has noted in a number of other cases where a property was sold at auction
22 for far less than its fair market value, issues related to commercial unreasonableness are best left
23 to a jury. *See, e.g., U.S. Bank v. Countryside Homeowners Ass’n*, No. 2:15-cv-1463, 2016 WL
24

1 3638112, at *6 (D. Nev. July 7, 2016) (Jones, J.). Therefore, because this case can be summarily
2 adjudicated on other grounds, the Court declines to rule on these issues at this time.

3 **c. Remaining Claims and Cross-Claims**

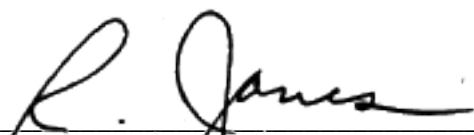
4 As indicated in Wells Fargo's motion, the relief granted herein resolves all claims in its
5 favor save the claim for unjust enrichment, which it intends to voluntarily dismiss. Accordingly,
6 the Court requests that Wells Fargo file a notice of voluntary dismissal of any remaining claims
7 forthwith. This case will then remain open only to dispose of the cross-claims asserted by Entrust
8 against the HOA.

9 **CONCLUSION**

10 IT IS HEREBY ORDERED that Entrust's Motion for Summary Judgment (ECF No. 30)
11 is DENIED.

12 IT IS FURTHER ORDERED that Wells Fargo's Motion for Summary Judgment (ECF
13 No. 31) is GRANTED. Wells Fargo shall file a notice of voluntary dismissal of any remaining
14 claims within thirty days of this Order.

15 IT IS SO ORDERED.

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19 ROBERT C. JONES
United States District Judge

20 July 23, 2018
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